

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 228 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE K.M.MEHTA

- =====
1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? :

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ANISH RAMESHBHAI PATEL

Versus

ABBASBHAI MAHMADALI VANIA

Appearance:

1. Second Appeal No. 228 of 1991
MR SURESH M SHAH for Petitioner No. 1
..... for Petitioner No. 2
MR CJ VIN for Respondent No. 1
MS ROOPAL R PATEL for Respondent No. 1
MR MA KHARADI for Respondent No. 1
..... for Respondent No. 2
-

CORAM : MR.JUSTICE K.M.MEHTA

Date of decision: 20/08/2002

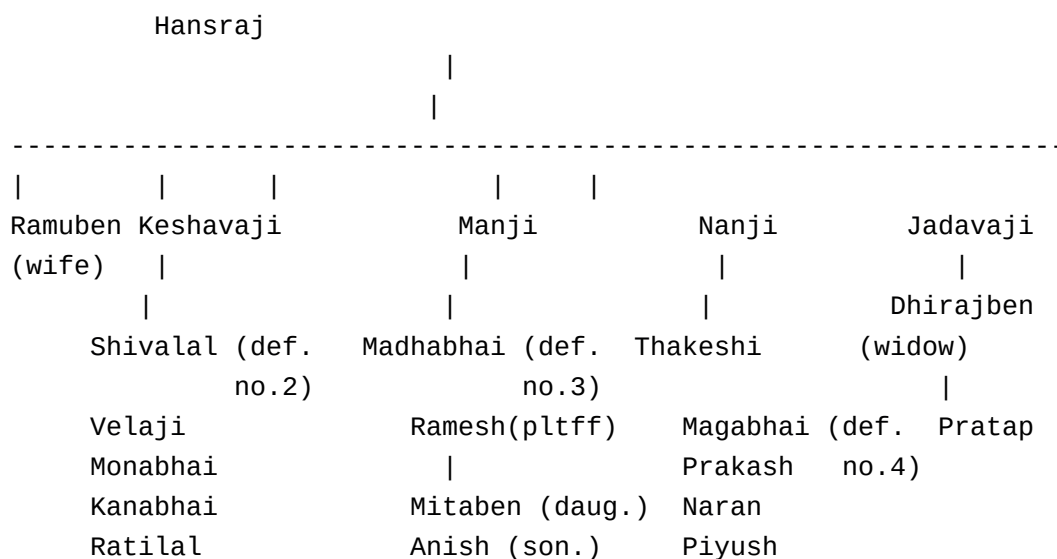
C.A.V. JUDGEMENT

1. Anish Rameshbhai Patel and Smt.Mitaben Rameshbhai Patel - appellants (original obstructors) defendants in suit have filed this Second Appeal under Section 100 of the Code of Civil Procedure against the judgment and decree dated 30th October, 1991, passed by learned Extra Assistant Judge, Jamnagar, in Regular Civil Appeal No.70 of 1991. The learned Judge by his impugned judgment and decree was pleased to dismiss the appeal and confirmed the order dated 23rd September, 1991, passed by the learned 2nd Jt.Civil Judge (S.D.), Jamnagar, in Regular Darkhast No.123/84 order passed below Ex.84, 87 and Ex.94. The learned trial Judge by his impugned judgment pleased to reject Exh.84, 87 & 94 filed by the objector Rameshchandra Manji as well as the wife and children of the applicants in this behalf. The learned trial Judge further held that the execution proceedings be proceeded from the stage at which these applications were filed.

2. The relevant facts giving rise to this Second Appeal are as under:-

Background of the matter :
Re. Civil Suit No.60/76

2.1 Before I set out the facts giving rise to this appeal it is better if I set out the pedigree in this behalf so that the facts can be properly appreciated in its true perspective.



2.1(A) Descriptions of the Parties:-

The family of Hansrajbhai was at the relevant

time mentioned in pedigree. Hansrajbhai's wife was Ramuben and his sons are Keshavji, Manji, Nanji and Jadavji. Keshavji had son Shivilal (defendant No.1). Manjibhai had two sons Madhabhai (defendant No.3) and Rameshbhai (father of present appellant). Nanjibhai had son Thakeshi. Jadavji had son Pratapbhai and widow Dhirajben. Mitaben and Anish are the daughter and son of Rameshbhai and, therefore, it was a joint family of Hansrajbhai.

2.1(B) In 1947 they were residing at Karachi but thereafter Hansrajbhai died in Karachi. In 1947 after the partition of the countries India and Pakistan, Ramuben, Manjibhai, Nanjibhai, Dhirajben widow of Jadavji and jadavji's son Pratapbhai all came to India and they have decided to stay at Jamnagar. Out of all these family members Shivilal i.e. Keshavji's son had studied and he was acting as a Karta of Hindu Joint Family.

2.2 There is a property situated at Jamnagar Hospital Road opposite Mahila Mandal known as "Abbasi Building" (hereinafter referred to as 'the suit property'). Abbasali Mahmadali Vania original plaintiff is the owner of the suit property. The plaintiff has let out the suit property to family of Patel Shivilal Keshavaji residing at Bombay (defendant in the suit). The property was let out to the family members of the defendant since long time. However, since 1st November, 1974 to 30th April, 1975 the defendant failed and neglect to make the payment of rent, the plaintiff addressed a statutory notice vide Exh.50 dated 1st May, 1975 terminating the tenancy of the defendant.

2.3 As defendant failed to hand over the suit premises the plaintiff thereafter filed a suit on 30th January, 1976, being Civil Suit No.60/76 before the learned Civil Judge (S.D.), Jamnagar for obtaining possession of the suit premises. In the suit the plaintiff has claimed rent for the period from 1.11.74 to 30.4.1975 Rs.480/- and mesne profit Rs.720/- from 1.5.1975 to 31.1.1976 in all Rs.1200/- and possession of the suit premises. The plaintiff also produced necessary documentary evidence in this behalf.

2.4 The defendant Patel Shivilal Keshavji filed a written statement at Exh.38 and denied the contentions therein. He has raised the dispute regarding standard rent. He has denied the termination of tenancy in this behalf. It was specifically admitted that the possession of the suit premises is with the plaintiff and his family members. The said written statement was filed.

Thereafter issues were raised.

2.5 On behalf of plaintiff Abbasali Mohmadali was examined at Exh.49, one Jayesh Hariprasad clerk of the office of Deputy Collector was examined at Exh.56. One Idas a clerk in the supply department was also examined at Exh.59. Over and above the plaintiff has also produced notice and the acknowledgment receipt, certificate from extract of Final Electoral Roll at Exh.53 which shows the name of Patel Shivilal Keshavji and family members of Shivilal were residing at Bombay. He has also produced the list of Gujarat State Vidhansabha Electoral Roll where the name of Madhukar Manjibhai, Nirmalaben Madhukarbhai, Rameshchandra Manjibhai and Kiranben Rameshchandra was stated at Exh.58 and copy of ration card at Exh.60.

2.6 On behalf of defendant Madhubhai was examined at Exh.66. One Valjibhai Mavjibhai was examined at Exh.71. A copy of power of attorney was also produced by which Shivilal has given his power of attorney to his brother Madhubhai.

2.7 Ultimately the trial Court heard the matter and by its judgment and decree dated 31st December, 1982, the trial Court pleased to pass a decree in favour of the plaintiff and directed the defendants to hand over the possession of the suit premises in this behalf.

2.8 Being aggrieved and dissatisfied with the aforesaid judgment and decree, Shivilal Keshavji filed Regular Appeal being Regular Civil Appeal No.55 of 1983 before the District Court at Jamnagar on 2nd April, 1983. It appears that on 16th July, 1983, appellant desire to withdraw the appeal and therefore the appellate court passed following order on 16.7.83.

"Appellant wants to withdraw. His Advocate Shri Raval admits it. Recorded refund be given as per rules."

CIVIL SUIT NO.694/83:

2.9 It appears that thereafter Rameshchandra Manjibhai - father of the present appellants original obstructors and son of Manjibhai, cousin brother of Shivilalbhai original tenant filed a Civil Suit No.694/83 before the learned Civil Judge (S.D.), Jamnagar. In the said suit he has stated that Abbasali Mohmadali Vania defendant no.1 has obtained the decree for possession in Civil Suit No.60/76 regarding suit property has been

obtained fraudulently and therefore declared the same as nullity.

2.10 In the suit it was prayed that decree obtained in Civil Suit No.60/76 was not binding on him and for permanent injunction he has also obtained interim injunction against execution of the said decree.

2.11 The said suit was filed on 16th July, 1983. On 12.8.83 the parties entered into compromise in which it was agreed between Ismailbhai - original plaintiff and Patel Shivilal Keshavji that whatever goods of Shivilalbhai may be sold by Abbasali within 12 months and two rooms may be retained by tenant but the possession of the two rooms may be handed over to plaintiff Ismailbhai.

2.12 It appears that Rameshchandra Manjibhai who claims to be tenant of the suit premises and who had filed Regular Civil Suit No.694/83 gave application Exh.12 to the Court of learned Civil Judge (S.D.), Jamnagar on 22nd January, 1987, stating that he had never instructed to his lawyer to withdraw the suit on 12.8.83 or to abandon any relief or claim and there was no reason for withdrawal and he intends to continue this suit and prayed that the order passed below Exh.10 & Exh.1 dated 12.8.83 be declared as nullity that was Exh.12 for declaration that the decree dated 12th August, 1983, be declared as nullity and Exh.15 for interim injunction that defendant may not execute the decree in this behalf. On that day he also gave application Exh.15 for interim injunction for executing the decree passed in Regular Civil Suit No.60/76. The learned Civil judge granted application Exh.15 on 19th March 1987 and Ex.12 came to be allowed on 15th May, 1987. The learned Civil Judge was of the view that the withdrawal of the suit has no legal effect.

2.13 Being aggrieved and dissatisfied with the said order, Abbasali Mohmadali Vania filed Civil Revision Application No.275 of 1987 so far it relates to order dated 19th March 1987 i.e. order passed below Exh.15 before this Court. The said revision application was filed on 16th April, 1987. So far as the order dated 15th March, 1987, passed below Exh.12, Abbasali Mohmadali Vania filed Civil Revision Application No.555 of 1987 before this Court on 14th July, 1987. Both these civil revision applications were heard by this Court (Coram: G.T.Nanavati, J. (as he was then)). The learned Judge by his judgment and order dated 27th November, 1989, pleased to allow the revision application No.555/87 and set aside the order passed below Exh.12. The learned

Judge also set aside the order passed below Exh.15 dated 19th March, 1987, and said revision application was also allowed. The learned Judge thereafter directed the learned Civil Judge to hear applications Exh.12 and 15 afresh after giving an opportunity to both the sides to lead evidence in their possession. The learned Single Judge also directed the learned Civil Judge to dispose of those applications as expeditiously as possible and further directed that till application Exh.12 is decided, the interim injunction which was granted by the trial Court on 15th May, 1987, shall be continued in this behalf.

2.14 After the judgment of this Court again Exhs.12 and 15 were heard. In the said two applications the owner filed reply at Exh.17 and 18 and ultimately the trial Court by detailed order dated 5.3.91 pleased to dismiss both the applications.

2.15 Being aggrieved and dissatisfied with the said order, Rameshchandra Manjibhai filed Civil Revision Application No.351 of 1991 before this Court on 3rd April, 1991. This Court (Coram: B.C.Patel, J. (as he was then) vide order dated 11th April, 1991, pleased to reject the said application.

CIVIL SUIT NO.179 of 1986:

3. Mita Rameshchandra Patel and Anish Rameshchandra Patel daughter and son of Rameschandra present appellants through her mother Kiranben Rameshchandra Patel filed another suit No.179 of 1986 before the learned Civil Judge (S.D.) Jamnagar on 5.12.1986. In the said suit also it was prayed that the decree dated 31st December, 1982, passed in Civil Suit No.62/76 has obtained fraudulently and same may be declared as nullity. The plaintiff may be declared as tenant of the suit premises and defendant Abbasali Mohammadali Vania in that suit namely original plaintiff be restrained from taking possession of the suit premises.

3.1 It may be noted that Shivilal Keshavji and Rameshchandra Manjibhai were joined as defendants No.2 and 3 in the said suit. In the said suit application Exh.5 was also filed for obtaining interim injunction before the trial Court. The trial Court by its judgment and order dated 17th January, 1987, passed below Exh.5 in Suit No.179/86 pleased to reject the said application. (Re. page 781 of the compilation).

3.2 In the said suit the plaintiff gave application being Civil Misc.Application No.11 of 1987 under Section 24 of CPC for transferring of Special Civil Suit No.179 of 1986 from the court of 3rd Jt.Civil Judge (S.D.), Jamnagar to any other court. The learned District Judge, Jamnagar by his judgment and order dated 5th March, 1987 pleased to reject the transfer application and further directed the learned trial Judge to proceed with the suit in this behalf. It appears that on 17th January, 1987, the plaintiff gave application for withdrawal of the suit and the learned trial judge by his order dated 17th January, 1997, pleased to withdraw the suit when the aforesaid second appeal pending before this Court. The certified copy of the said withdrawal has been produced by decree holder in this behalf and which has been taken on record.

REGULAR DARKHAST NO.123/84 FROM WHICH THE PRESENT PROCEEDINGS WERE INITIATED.

4. Abbasali Mohmadali Vania - original plaintiff and decree holder filed a regular darkhast before the learned Civil Judge (S.D.) Jamnagar on 12th November, 1984, for obtaining the possession of the suit premises on the strength of decree dated 31st December, 1982, in Civil Suit No.60/76. In the said darkhast application plaintiff decree holder produced certain documents in this behalf. In that application Rameshchandra Manjibhai and others obstructionists filed reply on 23rd April, 1985, and opposed warrant for possession in this behalf against the decree holder. The learned 3rd Jt.Civil Judge (S.D.), Jamnagar passed an order on 18th September, 1986, passed below Ex.1 and held that the warrant for possession under Order 21 Rule 25 read with Order 21 Rule 20 be given in favour of decree holder and same can be executed against the judgment debtor.

4.1 It appears that being aggrieved and dissatisfied with the said order dated 18th September, 1986, rejecting the objection raised by Rameshchandra and granting possession warrant in favour of Abbasali Mohmadali Vani, Rameshchandra filed Civil Revision Application No.1317/86 before this Court somewhere in October 1986. This Court originally passed order on 7th October, 1986, but ultimately it appears that the said civil revision application was withdrawn on 14th October, 1986. (Re. page 351 of the compilation). The same has been produced at Exh.89 on page 749 of the compilation).

4.2 Being aggrieved and dissatisfied with the aforesaid order dated 18th September, 1986, Rameshchandra

Manjibhai filed Regular Civil Appeal No.135/87 before the learned Joint District Judge, Jamnagar, wherein trial Court rejected for postponement of possession warrant. The learned Jt.District Judge by his judgment and order dated 29th September, 1988, pleased to reject the said appeal in this behalf. The order of the said appeal has been produced at Exh.63 page 515 of the compilation.

4.3 Thereafter the plaintiff decree holder again filed application Exh.50 on 30th December, 1986, for warrant for possession may be executed through Court bailiff.

4.4 Thereafter again plaintiff decree holder filed an application Ex.62 dated 7th October, 1988, for obtaining for warrant of possession in this behalf and also prayed that the tenant be directed to pay Rs.9565/for the rent till 30th September 1988. The said application has been produced at Ex.62 page 511 of the compilation.

4.4(A) The obstructionists opposed the said application. The learned 3rd Jt.Civil Judge (S.D.), Jamnagar, by his judgment and order dated 10th April, 1989, ordered that execution petition and both the applications Exh.50 and 62 be stayed till further orders. (See. Page 361 of the compilation).

4.5 It appears that somewhere on 3rd April, 1991, Rameshchandra Manjibhai gave undertaking before the Darkhast Court that he will hand over the possession of the suit premises in this behalf. The copy of the said application dated 3rd April, 1991, is not on the record. The plaintiff thereafter gave application Exh.75 dated 8th April, 1991, that the undertaking which he has given be further extended and the Court further extended the stay in this behalf and passed order from time to time. The plaintiff also thereafter gave application on 19th April, 1991, at Exh.79 supported by affidavits at Exh.80 for obtaining possession help of police may be given to him.

PRESENT CONTROVERSY:

5. Mitaben Rameshchandra and Anish Rameshchandra filed application in Regular Darkshat No. 123/84 on 23.4.91 praying that the decree for possession obtained by Abbasali Mohmadali Vania Civil Suit No.60/76 regarding the suit property is not binding on them because the same was obtained by Shivilal and the plaintiff may not be able to obtain possession (i.e. Exh.82 See page 575 of the compilation). Alongwith the said application application

Exh.84 on 23.4.91 was also filed by obstructionists that till Exh.82 is decided the decree for possession passed in Civil Suit No.60/76 may not be executed. The said application was filed on 23rd April, 1991, page 595 of the compilation. The applicant also gave application Exh.94 dated 26th April, 1991, on the ground that the decree for possession which was obtained by plaintiff there is a misdescription of the property and, therefore, decree for possession may be granted and thereafter same can be executed.

5.1 The original plaintiff thereafter filed reply in the said application on 24th April, 1991, at Exh.90 (Page 893 of the compilation) against the injunction application. The plaintiff also filed reply against the applications dated 23rd April, 1991, at Exh.91 (page 903 of the compilation) in this behalf. The plaintiff also produced necessary documentary evidence in this behalf.

5.1(A) The learned trial Judge by his judgment and order dated 23rd September, 1991, heard Exhs.84, 87 & 94 together. He has considered the application and the reply filed by the original plaintiff. After considering the entire evidence on record, the learned trial judge held that the present application is not required to be stayed. The learned trial Judge further held that the decree passed in Civil Suit No.60/76 is not required to be returned to decree holder for getting it amended through court which passed the decree. Ultimately the learned trial Judge pleased to reject the applications Exh.84, 87 & 94 filed by objectors Rameshchandra as well as wife and children of applicants present appellants herein. The learned trial Judge directed that the execution proceedings be proceeded further from the stage which these applications have been filed.

5.2 Being aggrieved and dissatisfied with the aforesaid order, Anish Rameshchandra Patel and Mita Rameshchandra Patel filed Regular Civil Appeal No.70/91 before the learned Extra Assistant Judge, Jamnagar, on 26th September, 1991. The learned Extra Assistant Judge by his judgment and order dated 30th October, 1991, pleased to dismiss the appeal. The learned Judge after considering the entire evidence on record came to the conclusion that the impugned order passed by the learned trial Judge is legal and valid and, therefore, appeal requires to be dismissed.

5.2(A) While dismissing the appeal, the learned appellate Judge has considered the proceedings of Civil Suit No.60/76, Civil Suit No.694/83, Civil Suit No.179/86

and also the present proceedings and held that in view of the aforesaid proceedings the Court has come to the conclusion that the present appellants have come before the executing court raising the same plea under their objections vide Ex.82 and Ex.84 with a view to prolong the proceedings of the Darkshat. Under these circumstances the appellants' objections and their claim under the above objections are barred by the principles of res-judicata. The appellate court further held that the appellants are further being son and daughter of Rameshchandra falling in the head of Rameshchandra in the pedigree of the family members given in their applications Ex.82 and Ex.84, therefore, the decision of the executing court upon the objections raised by the Rameshchandra before it precludes the present appellants raising the same plea under their different applications before the executing court by virtue of the principles of res judicata. The provisions of Sec.11 of C.P.C. are applicable to the proceedings for execution of a decree and references in this section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree. Thus, the decision taken against Rameshchandra Manaji in the execution proceeding of the Darkhast No.123/84 operates as a res judicata against the present appellants and, therefore, such plea raised by the present appellants cannot be considered by the court.

5.2(B) The appellate court further held that in the present case the objections raised by the present appellants are not the objections raised by them against the execution of the decree for the first time. It is an admitted fact that the present appellants had also filed one Special Civil Suit No.179/86 against the execution of the decree passed in the Regular Civil Suit No.60/76 and in that suit the appellants have sought for setting aside the decree passed in the above suit on the ground of fraud and collusion. The grounds taken in the above Special Civil Suit No.179/86 are the same grounds taken by the present appellants in their applications Ex.82 and Ex.84 in the Darkhast proceedings. In that matter injunction application was rejected and thereafter appeal was filed which was pending. The court further held that the documents produced by the appellants before the executing court and their contentions raised before it also there is no prima facie case established by the appellants for the grant of injunction against the execution of the decree passed in Regular Civil Suit No.60/76. The appellants have also not established prima

facie that they are holding the possession of the decretal property under their own rights and not derived from the judgment debtor. The court held that Rameshchandra Manji the father of the appellants had filed his objections before the executing court and he has been succeeded in prolonging the execution petition, however he himself has instigated his son and daughter the present appellants to file the Special Civil Suit No.179/86 wherein the present appellants were succeeded to get ad-interim injunction but the said temporary injunction issued by the court in the said suit has been vacated subsequently after a considerable period.

5.3 Being aggrieved and dissatisfied with the said judgment and order the present appellants have filed this appeal challenging the said judgment and order dated 15th November, 1991. This Court passed an order on 18th November, 1991, and granted necessary stay of the order of trial Court.

5.4 It may be noted that the said appeal was admitted by this Court on 13th December, 1991, where this Court has raised two substantial question of law in this behalf:

- (1) Whether in the facts and circumstances of the case, it can be held that inquiry or investigation was carried out regarding the obstruction offered by the appellants?
- (2) Whether there is any substantial error in disposing of Ex.82, though arguments were heard on Exs.84, 87 and 94?

6. Mr.S.M.Shah, learned senior counsel for the appellant original obstructionists has argued the matter at length before me in this behalf. He has made following submissions:

6.1 He submitted that both the trial court as well as appellate court has not considered the provisions of Order 21 Rule 35 and Rule 97 to Order 21 Rule 103 & Rule 104 which falls within the chapter of resistance to delivery of possession to decree holder or purchaser.

6.2 Order 21 provides Execution of Decrees and Orders.

6.3 He has also relied upon Order 21 Rule 35 which

reads as under:

"Rule 35 Decree for immovable property :- (1)

Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property.

(2) Where a decree is for the joint possession of immovable property, such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum, or other customary mode, at some convenient place, the substance of the decree.

(3) Where possession of any building or enclosure is to be delivered and the person in possession, being bound by the decree, does not afford free access, the Court, through its officers, may, after giving reasonable warning and facility to any woman not appearing in public according to the customs of the country to withdraw, remove or open any lock or bolt or break open any door or do any other act necessary for putting the decree-holder in possession."

"Rule 97 provides resistance or obstruction to possession of immovable property :-

(1) Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction.

(2) Where any application is made under sub-rule(1), the Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.

Rule 98 provides orders after adjudication:-

(1) Upon the determination of the questions referred to in Rule 101, the Court shall, in accordance with such determination and subject to the provisions of sub-rule (2), -

(a) make an order allowing the

application and directing that the applicant be put into possession of the property or dismissing the application; or
(b) pass such other order as, in the circumstances of the case, it may deem fit.

(2) Where, upon such determination, the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation or on his behalf or by any transferee, where such transfer was made during the pendency of the suit or execution proceeding, it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession, the Court may also at the instance of the applicant, order the judgment-debtor, or any person acting at his instigation or on his behalf, to be detained in the civil prison for a term which may extend to thirty days.

Rule 99 provides dispossession by decree-holder or purchaser:-

(1) Where any person other than the judgment-debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchase thereof, he may make an application to the Court complaining of such dispossession.
(2) Where any such application is made, the Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.

Rule 100 provides order to be passed upon application complaining of dispossession:-

(1) Upon the determination of the questions referred in rule 101, the Court shall, in accordance with such determination,-
(a) make an order allowing the application and directing that the applicant be put into possession of the property or dismissing the application; or
(b) pass such order as, in the circumstances of the case, it may

deem fit.

Rule 101 provides questions to be determined: All questions (including questions relating to right, title or interest in the property) arising between the parties to a proceeding on an application under rule 97 or rule 99 or their representatives, and relevant to the adjudication of the application, shall be determined by the Court dealing with the application and not by a separate suit and for this purpose, the Court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such question.

Rule 102 provides rules not applicable to transferee pendente lite.

Rule 103 provides orders to be treated as decrees.

Rule 104 provides order under rule 101 or rule 103 to be subject to the result of pending suit."

6.4 After relying upon the aforesaid provisions, the learned counsel for the appellants submitted that it is obligatory for the executing court to decide the matter of the obstruction application on merits by making necessary investigation of facts and it has to record its conclusion about the obstruction raised therein. The learned counsel further submitted that the trial court ought to have investigated the facts regarding as to whether the obstructions were ordered to be removed and execution to be proceeded ahead or to allow the obstruction and prevent the execution against the obstructors and there can be no order of proceeding with the execution ahead without such investigation and final conclusion in the matter.

6.5 He further submitted that the lower court has erred in finding that there is a bar of resjudicata to the present proceeding of obstruction though no such point for determination has ever been raised or tried or considered in the trial court. He further submitted that the lower court has failed to consider that Abbasali Mohmadali Vania - original plaintiff has by filing written objections at Exh.90 in substance asked for the removal of the obstruction and proceeding with the execution and getting possession by removing the

appellants from the property of which possession is sought in the execution. He submitted that Exh.90 has to be registered accordingly and necessary investigation has to be made as required by the provisions of Order 21 Rules 97 to 103 of the CPC and without that the execution cannot be allowed to be proceeded and no order to proceed ahead with the execution can be legally and validly passed.

6.6 Learned counsel further submitted that the obstruction application Exh.82 has been filed by the appellants, there can be no further proceedings of execution against the appellants and they cannot be removed from the premises in question so long as the Executing Court does not decide the matter of the obstruction and so long as removal of obstruction is not ordered by the Executing Court and it is necessary to determine the matter of the obstruction before execution can be ordered to be proceeded further.

6.7 Learned counsel further submitted that the lower court has erred in considering the question without it having been tried by the trial court as to whether the decree sought to be executed has any binding effect on the present appellants and considering further as to whether the appellants are holding possession independently of the judgment debtor. He submitted that this is a question which has not yet been raised or decided by the trial court as required by law.

7. Learned counsel for the appellants has relied upon the judgment of the Privy Council in the case of The Bank of Bihar Ltd. vs. Sarangdhar Singh and another reported in AIR (36) 1949 Privy Council 8 particularly para 16 which reads as under:

"Their Lordships agree with the above view. The rule is well established that an execution Court cannot go behind the decree and question its correctness; but when the decree is silent, as in the present case and gives no indication as to what property should be sold in execution, it is permissible for the Court to look into the judgment in order to find out whether upon any issue properly raised and determined as between the parties interested the property brought to sale has been held to belong to the judgment debtor."

7.1 He has also relied upon the judgment of the Hon'ble Apex Court in the case of Babulal vs. Raj Kumar

& Ors. reported in JT 1996(2) S.C. 716 particularly paras 5, 6 & 7 the Hon'ble Supreme Court has observed as under:

"Para.5 In the execution application filed under Order 21 Rule 32 of the CPC the appellant filed an objection on the ground that he could not be dispossessed. It is not in dispute that the appellant was not a party to the decree for specific performance. His objection was over-ruled by the executing Court holding that since he had not been dispossessed, application under Order 21 Rule 97 is not maintainable. That view was affirmed by the High Court in the impugned order dated May 9, 1995 in CRP No.656/94 by the High Court of Rajasthan at Jaipur Bench. Thus, this appeal by special leave.

"Para.6 The controversy is no longer res integra. This Court in Bhanwar Lal v. Satyanarain & Anr. [JT 1994(6) SC 626 = (1995) 1 SCC 6] considered the controversy and had held that even an application filed under Order 21 Rule 35(3) or one filed under Section 47 would be treated as an application under Order 21 Rule 97 and an adjudication is required to be conducted under Rule 98. Dispossession of the applicant from the property in execution is not a condition for declining to entertain the application. The reasons are obvious. The specific provisions contained in Order 21 Rules 98, 101, 102 enjoin conduct of a regular adjudication, finding recorded thereon would be a decree and bind the parties. In para 7 thereof it was held thus:

"In the above view we have taken, the High Court has committed grievous error of jurisdiction and also patent illegality in treating the application filed by the appellant as barred by limitation and the third one on res judicata. Once the application, dated 25.5.1979 was made, the Court should have treated it to be one filed under Order 21, Rule 97(1) CPC. The question of res judicata for filing the second and third applications does not arise. Under these circumstances, the appellate court, though for different reasons was justified in directing an enquiry to be conducted for removal of the obstruction

or resistance caused by Satyanarain under Order 21 Rule 35(3) and Order 21, Rules 101 and 102 of CPC."

"Para 7. It would, therefore, be clear that an adjudication is required to be conducted under Order 21, Rule 98 before removal of the obstruction caused by the object or the appellant and a finding is required to be recorded in that behalf. The order is treated as a decree under Order 21, Rule 103 and it shall be subject to an appeal. Prior to 1976, the order was subject to suit under 1976 Amendment to CPC that may be pending on the date of the commencement of the amended provisions of CPC was secured. Thereafter, under the amended Code, right of suit under Order 21, Rule 63 of old Code has been taken away. The determination of the question of the right, title or interest of the objector in the immovable property under execution needs to be adjudicated under Order 21, Rule 98 which is an order and is a decree under Order 21, Rule 103 for the purpose of appeal subject to the same conditions as to an appeal or otherwise as if it were a decree. Thus, the procedure prescribed is a complete code in itself. Therefore, the executing Court is required to determine the question, when the appellants had objected to the execution of the decree as against the appellants who were not parties to the decree for specific performance."

7.1(A) Learned counsel for the appellants has relied upon the judgment of the Hon'ble Apex Court in the case of Brahmdeo Chaudhary vs. Prasad Jaiswal and another reported in AIR 1997 SC 856 on page 858 after quoting Order 21 Rule 35 and Order 21 Rule 97 as well as Rules 98, 99 and 101 and ultimately in para 5 on page 861 the Hon'ble Supreme Court has observed as under:

"Para.5 In short the aforesaid statutory provisions of Order XXI lay down a complete code for resolving all disputes pertaining to execution of decree for possession obtained by a decree-holder and whose attempts at executing the said decree meet with rough weather. Once resistance is offered by a purported stranger to the decree and which comes to be noted by the Executing Court as well as by the decree-holder the remedy available to the decree-holder against such an obstructionist is only under Order XXI,

Rule 97 sub-rule (1) and he cannot by-pass such obstruction and insist on re-issuance of warrant for possession under Order XXI, Rule 97 in connection with removal of obstruction of purported strangers to the decree. Once such an obstruction is on the record of the Executing Court it is difficult to appreciate how the Executing Court can tell such obstructionist that he must first lose possession and then only his remedy is to move an application under Order XXI, Rule 99, CPC and pray for restoration of possession. The High Court by the impugned order and judgment has taken the view that the only remedy available to a stranger to the decree who claims any independent right, title or interest in the decretal property is to go by Order XXI, Rule 99. This view of the High Court on the aforesaid statutory scheme is clearly unsustainable. It is easy to visualise that a stranger to the decree who claims an independent right, title and interest in the decretal property can offer his resistance before getting actually dispossessed. He can equally agitate his grievance and claim for adjudication of his independent right, title and interest in the decretal property even after losing possession as per Order XXI, Rule 99. Order XXI, Rule 97 deals with a stage which is prior to the actual execution of the decree for possession wherein the grievance of the obstructionist can be adjudicated upon before actual delivery of possession to the decree-holder. While Order XXI, Rule 97 on the other hand deals with the subsequent stage in the execution proceedings where a stranger claiming any right, title and interest in the decretal property might have got actually dispossessed and claims restoration of possession on adjudication of his independent right, title and interest dehors the interest of the judgment-debtor. Both these types of enquiries in connection with the right, title and interest of a stranger to the decree are clearly contemplated by the aforesaid scheme of Order XXI and it is not as if that such a stranger to the decree can come in the picture only at the final stage after losing the possession and not before it if he is vigilant enough to raise his objection and obstruction before the warrant for possession gets actually executed against him. With respect the High Court has totally ignored the scheme of Order XXI, Rule 97 in this

connection by taking the view that only remedy of such stranger to the decree lies under Order XXI, Rule 99 and he has no locus standi to get adjudication of his claim prior to the actual delivery of possession to the decree-holder in the execution proceedings."

7.1(B) He has also relied upon another judgment of the Hon'ble Supreme Court in the case of Shreenath and another vs. Rajesh and others reported in AIR 1998 SC 1827 particularly para 14 on page 1832 the Hon'ble Supreme Court has observed as under:

"We find both either under the old law or the present law the right of a tenant or any person claiming right on his own of the property in case he resists, his objection under Order 21, Rule 97, has to be decided by the Executing Court itself."

7.1(C) He has also relied upon the judgment of the Hon'ble Supreme Court in the case of B.Gangadhar vs. B.G.Rajalingam reported in AIR 1996 SC 780 where in para 6 on page 782 the Hon'ble Supreme Court has observed as under:

"Rule 35(3) of Order 21 itself manifests that when a decree for possession of immovable property was granted and delivery of possession was directed to be done, the Court executing the decree is entitled to pass such incidental, ancillary or necessary orders for effective enforcement of the decree for possession. That power also includes the power to remove any obstruction or super-structure made pendente lite. The exercise of incidental, ancillary or inherent power is consequential to deliver possession of the property in execution of the decree. No doubt, the decree does not contain a mandatory injunction for demolition. But when the decree for possession had become final and the judgment-debtor has taken law in his hands and made any construction on the property pending suit, the decree-holder is not bound by any such construction. The relief of mandatory injunction, therefore, is consequential to or necessary for effectuation of the decree for possession. It is not necessary to file a separate suit when the construction was made pending suit without permission of the Court.

Otherwise, the decree becomes inexecutable driving the plaintiff again for another round of litigation which the Code expressly prohibits such multiplicity of proceedings."

7.2 He has also relied upon the judgment of this Court in the case of Chandravati Co-op. Housing Society Ltd., Maninagar vs. Bhairavnath Education & Cultural Society Trust & Ors. reported in 34(1) GLR 116 delivered by this Court (Coram: S.D.Shah, J. (as he was then)). In that case the learned Judge has considered the provisions of Order 21 Rule 97 to Order 21 Rule 104. The learned Judge also considered the commentary of Mulla, Civil Procedure Code 14th Edition, commentary of Mulla after amendment in 1976 about the aforesaid provisions, AIR Commentaries on the Civil Procedure Code 10th Edition considered the provisions of CPC in para 7 and 8 and then in para 9 the learned Judge has observed as under:

"Para 9. I am of the opinion that once obstruction is raised or resistance is offered by a third party to the holder of a decree for possession, the holder of the decree has the option of applying for removal of such obstruction under Order 21 Rule 97(2) of C.P.Code. To such application for removal of obstruction, the person in possession has right to file reply or objections and the Court dealing with such application under Order 21 Rule 97(2) is now empowered to adjudicate all questions including the question of right, title or interest of the person making obstruction or offering resistance. The executing Court is required to hold a detailed enquiry by permitting the parties to lead evidence and it is required to decide all questions including questions of right, title and interest of the parties vis-a-vis properties as well as right to possess the property. The power of the executing Court is of wide amplitude and is co-extensive with the power and jurisdiction of ordinary Civil Court trying a civil suit. In such proceedings, therefore, the claim of the third party in possession of the property is required to be fully gone into. Until his objections are overruled, the execution proceedings insofar as actual recovery of possession is concerned, automatically gets stayed. It may be mentioned here that the holder of decree for possession can also resort to remedy of instituting an independent suit to recover possession of the

property against such third party in possession. This remedy is even otherwise available to a holder of a decree for possession under ordinary civil law and the same is not and cannot be barred. This remedy is over and above the remedy provided by Order 21 Rule 97(2) of C.P.Code. When he resorts to this remedy which under the amended provision is no longer a summary remedy, the warrant for possession as against the third party is not executed."

7.2(A) Thereafter again the learned Judge has considered Order 21 and in para 14 & 15 the Court has held as under:

"Para.14 From the aforesaid provisions, it becomes clear that a third party in possession of the property can by filing objection to application under Order 21 Rule 97(2) of Civil Procedure Code get his right, title and interest fully adjudicated upon by the Civil Court by leading evidence and till then his possession is protected. If the order is adverse to third party, it has the right to appeal. It may be mentioned that if such third party has already resorted to the remedy of filing a civil suit for declaration of his right, title or interest as well as for protection of its possession, such remedy of the third party is also not prejudiced. In my opinion if third party has not already instituted a suit for protection of its possession or for adjudication of its right, title or interest in the suit property, and if application under Order 21 Rule 97(2) of Civil Procedure Code is made, such third party has the right to file objection and to point out to the Court as to why he should not be removed. There is no necessity for such third party to resort to a separate suit. In fact, legislature wanted to avoid filing of a separate suit by such third party if it has not filed such suit. The legislature in fact wanted to avoid multiplicity of proceedings. It wanted to provide efficacious remedy both to the decree-holder as well as to the third party in possession whose rights, title and interest, vis-a-vis, the property in question and vis-a-vis, a decree-holder are yet not adjudicated upon. Under the old provisions executing Court could not have undertaken this exercise. Now under the amended provision this power to adjudicate upon all questions including question of right, title and interest in the

property is given to the executing Court and, therefore, in my opinion, there is no need for such third party to file a separate suit if it has already not filed the suit and Rule 104 of Order 21 protects the pending suit and makes the order of the executing Court subject to the result of the pending suit.

"Para.15 From the aforesaid scheme of the rules, in my opinion, it becomes abundantly clear that application under Order 21 Rule 97(2) of Civil Procedure Code filed by the holder of decree for possession must proceed expeditiously according to law by providing full opportunity to the decree-holder as well as obstructionist to lead whatever evidence they want to lead so that there can be final adjudication of all questions including question of their right, title and interest, vis-a-vis the property in execution. Till such application is decided question of recovering possession from such third party does not arise because the executing Court shall have to decide as to whether obstruction made by the third party is to be removed or not. The third party is, therefore, fully protected. Therefore, even if the third party has filed an independent separate suit for establishment of his right, title or interest, there is no justification in law for any Court to stay the proceedings under Order 21 Rule 97(2) till such suit filed by the third party is decided. In fact, order passed under Rule 97(2) or 99 which is to be treated as decree under Rule 101 is always subject to the result of such pending suit filed by the third party and, therefore, there can be no justification for stay of the proceedings under Order 21 Rule 97(2) of Civil Procedure Code."

7.2(B) Thereafter in Para 16 the learned Judge has considered the judgment of Calcutta High Court delivered by Justice G.N.Ray (as he was then) then on para 16 after quoting the judgment reported in AIR 1984 Cal.249 the learned Judge has observed as under:

"....From the aforesaid observations it becomes clear that a third party in possession of the property has right to file objection raising all questions including question of right, title and interest and executing Court is required to adjudicate upon all such questions. It is true that Rule 99 Order 21 deals with the situation

when a third party is already dispossessed by the holder of the decree and such a third party is empowered to apply to the executing Court to restore him possession. If the executing Court refuses to adjudicate upon the claim of the third party, such party can institute an independent civil suit for a declaration of his right, title and interest. But when the executing Court is already inquiring into the objections filed by the third party, in my opinion, there is no need of instituting a separate suit and even if such civil suit is instituted there is no need for executing Court to stay its hand till the civil suit filed by the third party is decided. The very object of introducing Order 21 Rule 97(2) and of introducing Rule 101 would be frustrated if executing Court are required to stay their hands despite the fact that it is undertaking the same inquiry which can be undertaken by a Civil Court in independent civil suit. In my opinion, therefore, Mr.M.C.Bhatt, learned Counsel appearing for the petitioner is right in contending that executing Court which has already embarked upon adjudication of right, title and interest of the holder of a decree for possession and the third party resisting such decree-holder in the application under Order 21 Rule 97(2) is not required to stay such proceedings till independently instituted suit by the third party is decided. A decree-holder cannot be indefinitely denied the fruits of its decree and, therefore, with a view to avoiding multiplicity of litigation and delay in execution for decree for possession of immovable property the legislature has by amending the law now provided a remedy of adjudication of all questions including question of right, title and interest by the executing Court itself and order passed by the executing Court is treated as a decree so that substantive right of appeal is also provided. Therefore, there is no scope of any independent or separate suit to be filed by the third party and even if such suit is filed, the executing Court is under no obligation to stay adjudication under Order 21 Rule 97(2) of Civil Procedure Code. To such a situation Sec.10 of Civil Procedure Code cannot have any application because by very nature of scheme enacted by Order 21 Rule 97 to Rule 104 speedy remedy is provided by the legislature to adjudicate upon all questions including question of right, title and

interest and therefore, by necessary implication application of Sec.10 to such proceeding is excluded. That apart, Sec.10 of Civil Procedure Code cannot proprio vigore apply to an application for execution. In my opinion, therefore, the learned City Civil Judge was not right in staying the inquiry under Order 21 Rule 97(2) of Civil Procedure Code till final decision of the suit and the order passed by him, therefore, cannot be sustained."

7.2(C) Thereafter in para 17 & 18 the Hon'ble Court has observed as under:

"Para 17 From the aforesaid discussion of the scheme and the Rules of Order 21 it becomes clear that when the holder of decree for possession or the purchaser of any such property sold in execution of a decree comes with a warrant for possession, the appropriate remedy of a person other than the Judgment-Debtor is to resist or obstruct the holder of decree for possession, and when the holder of a decree for possession who applies to the executing Court under Order 21 Rule 97(2) of C.P.Code to remove such obstruction, to file objection challenging the application setting out his right, title and interest, vis-a-vis, property. Once such objections are filed the executing Court is required to fully adjudicate upon the right, title and interest of the said third party, vis-a-vis, the holder of decree for possession and vis-a-vis the property. Till such adjudication is undertaken by the executing Court after permitting the parties to lead evidence, the possession of such person is protected. If the order in such proceedings is against the third party in possession of the property, it has right to appeal against such order as such order passed by the executing Court is to be treated as decree. Secondly, the third party can also resort to remedy of filing Civil Suit for declaration of the right, title and interest as well as for protecting its possession though such remedy is not advisable to be resorted to. In fact, the legislature wanted to avoid filing of separate suit by such third party if it has not already filed the suit. The object of the legislature in enacting Order 21 Rule 97(2) was to avoid multiplicity of proceedings. Therefore, though remedy by way of filing a Civil Suit is

not specifically barred or excluded, resort to such remedy is meaningless. The remedies of the holder of decree for possession when he is obstructed by the third party are:

- (i) to proceed under Rule 97 of Order 21 C.P.Code.
- (ii) to apply again in execution of the decree under Rule 85 and 36; and
- (iii) to institute regular suit for recovery of possession against the third party.

"Para.18 From the aforesaid discussion, it also becomes abundantly clear that though the remedy of instituting a separate suit challenging the legality and validity of decree is available to a third party over and above the remedy of filing obstruction application under Order 21, Rule 97 C.P.Code the executing Court is not expected, and in fact, not required to stay the proceedings under Order 21 Rule 97(2) till such independent suit filed by the third party is decided. Section 10 of C.P.Code has no application to such execution proceedings. In fact to stay the proceedings under Order 21, Rule 97 of C.P.Code would amount to rendering the amendment in the aforesaid provisions absolutely meaningless and ineffective. The legislature has provided effective remedy to third party of complete adjudication of right, title and interest of the parties in the execution proceedings itself and it is expected that the executing Court itself shall expeditiously decide such right, title and interest of the parties. Therefore, in my opinion, the executing Court has no jurisdiction, whatsoever, to stay such proceedings and any attempt to import the provisions of Sec.10 C.P.Code to such proceedings would frustrate the legislative intent."

7.3 He has also relied upon the judgment of the Hon'ble Apex Court in the case of Pandit Ishwardas vs. State of Madhya Pradesh and others reported in (1979) 4 SCC 163 wherein in para 5 the Hon'ble Apex Court has observed as under:

"There is no impediment or bar against an

appellate Court permitting amendment of pleadings so as to enable a party to raise a new plea. All that is necessary is that the appellate Court should observe the well known principles subject to which amendments of pleadings are usually granted. Naturally one of the circumstances which will be taken into consideration before an amendment is granted is the delay in making the application seeking such amendment and, if made at the appellate stage, the reason why it was not sought in the trial Court. If the necessary material on which the plea arising from the amendment may be decided is already there, the amendment may be more readily granted than otherwise. But, there is no prohibition against an appellate Court permitting an amendment at the appellate stage merely because the necessary material is not already before the Court."

7.4 After relying upon the said judgment he has stated that whatever the new pleas raised by Rameshchandra the trial Court ought to have allowed upon such plea in this behalf.

7.5 He has also relied upon two Unreported Judgments of this Court in the case of Civil Revision Application No.937 of 1969 decided on 7.8.1970 (Coram: T.U.Mehta, J.) This revision application was against the revision application where the obstruction application rejected by the trial Court. On page 2 the learned Judge has observed as under:

"The contention which is raised on behalf of the petitioner is that the learned Judge, in passing the above order, has totally over looked the procedure contemplated by rules 97 and 98 of O.21 of the Civil Procedure Code. His contention is that the learned trial Judge should have investigated into the matter before passing any order as regards the obstruction made by the petitioner to the execution of the decree.

I find that this contention has good deal of substance. It is apparent from the facts of the case that the learned trial judge was under an impression that the petitioner-obstructor had to file further objections to the decree holder's application to the removal of obstruction. In fact the record shows that the petitioner had given written objections to the execution in order to justify his obstructions thereto. It

was thereafter the duty of the decree holder-plaintiff as contemplated by rule 97 0.21 to apply to the court to remove the said objections. The decree holder, in fact, made such an application. After that was done, the court, according to sub-rule(2) of Rule 97, is expected to fix the date for investigating the matter and to summon the party against whom the application is made to appear. Presuming that 11th September, 1969, the date on which the above quoted order was passed by the lower court, was the date for investigating the matter, and presuming also that the lower court had sufficient reasons to dismiss the obstruction's application for adjournment, the said court was under sub-rule(2) of Rule 97 bound to enter into investigation with a view to know whether the obstruction of the obstructor was justified or not. No such investigation is found to have been made by the lower court. Now the above quoted order shows that the obstruction was ordered to be removed not as a result of any investigation and on consideration of the merits of the case but simply because the obstructor did not file any "objection". It is difficult to comprehend what type of objection the obstructor was supposed to file. He had already given his grounds for obstruction in writing. Under these circumstances, it is found that the learned trial Judge of the executing Court has committed a clear breach of the procedure laid down in Rule 97 and 98 of the Order 21 of the Civil Procedure Code."

7.6 Thereafter another unreported judgment of this Court in the case of Civil Revision Application No.1377 of 1971 decided on 20th June, 1972 by Justice J.M.Sheth. This revision application was also against the execution petition and on page 2 the Hon'ble Court has observed as under:

"Mr.Suresh M.Shah, appearing for the petitioner, has urged that such an application has to be registered as an independent civil miscellaneous application, in view of the provisions of the Civil Manual. This contention of his is quite correct. The previous order of the High Court could not come in way of the petitioner. The High Court has merely directed to decide the application of the decree-holder for removal of the obstruction in accordance with law as

expeditiously as possible. This application, Ex.17, can be treated as an application for removal of such obstruction but it has got to be registered as a civil miscellaneous application with law. The aforesaid clarification is made and the trial court is directed to register the application, Ex.17, as an independent civil miscellaneous application and to proceed with that application in accordance with law as expeditiously as possible, as directed by this Court earlier. With that clarification, the revision application stands disposed of and rule is discharged. No order as to costs is made in this revision application in the circumstances of the case."

7.7 He has also relied upon the judgment in the case of Ram Chandra Verma vs. Manmal Singhi and another reported in AIR 1983 Sikkim 1 delivered by A.M.Bhattacharjee, J. (as he was then). In para 10, 11 & 13 the Hon'ble Court has observed as under:

"Para.10 If after a decree-holder has put the decree for delivery of possession of any movable property into execution, any person in possession of the property files an application opposing the execution on the ground that he is not bound by the decree, he is obviously resisting the execution of the decree and the consequential delivery of possession within the meaning of R.97. The word "resistance" cannot mean physical resistance only, but a clear expression of an intention by a person not to vacate the property through an application on the assertion that he is not bound by the decree is a sufficient resistance within the meaning of Rule 97 and if thereupon the decree-holder does not take step by filing an application under that rule, the executing Court cannot proceed with the execution, unless it holds that the objector is bound by the decree. That is also the view held by a learned Single judge in Mahabir Pershad v. Delhi Traders (AIR 1977 Delhi 45 at 46) to which also my attention has been drawn by Mr.Khargra and which has followed the Madhya Pradesh decision in Bhagawat v. Kasturi (AIR 1974 Madhya Pradesh para 26) (supra). As already noted, in the Division Bench decision of the Calcutta High Court in Sheikh Yusuf v. Jyotish Chandra (AIR 1932 Cal 241) (supra), such an application, purported to have been made under Sec.151, Civil

P.C., was entertained, and the execution was proceeded with after holding the appellant-objector to be bound by the decree. The executing Court, therefore, was wrong in holding that such an application cannot lie."

"Para.11 The executing Court in this case did not hold that the revision petitioner was bound by the decree and, therefore, he was wrong in ordering execution case to proceed, which he could do only if he could hold the revision petitioner to be bound by the decree. That being so, the executing Court should have stayed its hands in the matter leaving it to the decree-holder to proceed under Rule 97 or in such other manner as he might have thought fit. As the executing Court has no jurisdiction to proceed with the execution case when a third party in possession objects to the execution, unless he holds the objector to be bound by the decree, the executing Court in the case at hand exercised its jurisdiction illegally and with material irregularity to attract the revisional jurisdiction of this Court."

"Para.13 Mr.Sarkar has submitted that filing an application by the decree-holder under Rule 97 complaining of the resistance posed by the application would now be futile in view of the suit filed by the revision petitioner and would result in unnecessary multiplicity of proceedings. There is no obligation on the decree-holder to file such an application and he may not do so, if he is so advised. All that I have said is that after the executing Court found that a third party in possession was objecting to the execution of the decree by filing an application to that effect, the executing Court, without holding the party to be bound by the decree, could not reject the application as not maintainable under the law and order the execution to proceed and that the decree-holder in that circumstances, could have filed an application under R.97."

8. Mr.M.A.Kharadi, Learned advocate for the respondents has tried to support the order of the trial court as well as appellate court. He submitted that the second appeal is not maintainable because it does not raise substantial question of law in this behalf and, therefore, this Court may not entertain the second appeal

filed by the appellants in this behalf. He further submitted that looking to the facts involved herein the appellant has completely abuse the process of law and therefore this Court may not try to assist the appellant in second appeal at this stage. The appellants have tied all averments earlier and 1982 decree still not executed because one by one the appellants have tried to raise objections and therefore in any view of the matter this Court may not entertain this appeal in this behalf.

8.1 He has relied upon the judgment of the Hon'ble Apex Court (Three Judges Bench) in the case of Silverline Forum Pvt.Ltd. vs. Rajiv Trust and another reported in AIR 1998 SC 1754 para 9 & 10 on page 1756 and 1757 the Hon'ble Apex Court has observed as under:

"Para.9 At the outset, we may observe that it is difficult to agree with the High Court that resistance or obstructions made by a third party to the decree of execution cannot be gone into under Order 21, Rule 97 of the Code. Rules 97 to 106 in Order 21 of the Code are subsumed under the caption "Resistance to delivery of possession to decree-holder or purchaser". Those rules are intended to deal with every sort of resistance or obstructions offered by any person. Rule 97 specifically provides that when the holder of a decree for possession of immovable property is resisted or obstructed by "any person" in obtaining possession of the property such decree-holder has to make an application complaining of the resistance or obstruction. Sub-rule (2) makes it incumbent on the Court to proceed to adjudicate upon such complaint in accordance with the procedure laid down."

"Para.10 The words "all questions arising between the parties to a proceeding on an application under Rule 97" would envelop only such questions as would legally arise for determination between those parties. In other words, the Court is not obliged to determine a question merely because the resistor raised it. The questions which executing Court is obliged to determine under Rule 101, must possess two adjuncts. First is that such questions should have legally arisen between the parties, and the second is, such questions must be relevant for consideration and determination between the parties, e.g. if the obstructor admits that he is a transferee pendente lite it is not necessary

to determine a question raised by him that he was unaware of the litigation when he purchased the property. Similarly, a third party, who questions the validity of a transfer made by a decree-holder to an assignee, cannot claim that the question regarding its validity should be decided during execution proceedings. Hence, it is necessary that the questions raised by the resistor or the obstructor must legally arise between him and the decree-holder. In the adjudication process envisaged in Order 21, Rule 97(2) of the Code, execution Court can decide whether the question raised by a resistor or obstructor legally arise between the parties. An answer to the said question also would be the result of the adjudication contemplated in the sub-section."

Thereafter in para 12 and 13 on page 1757 the Hon'ble Supreme Court has observed as under:

"It is clear that executing Court can decide whether the resistor or obstructor is a person bound by the decree and he refuses to vacate the property. That question also squarely falls within the adjudicatory process contemplated in Order 21, Rule 97(2) of the Code. The adjudication mentioned therein need not necessarily involve a detailed enquiry or collection of evidence. Court can make the adjudication on admitted facts or even on the averments made by the resistor. Of course the Court can direct the parties to adduce evidence for such determination if the Court deems it necessary."

8.1(A) He has also relied upon another judgment of this Court in the case of Gangaben Ishwarlal Bhagat vs. Somabhai Maganbhai & Others reported in 1996 Vol.37(3) GLR 76. In paras 9, 10 & 11 the Hon'ble Court has observed as under:

"Para.9 Keeping in mind the legal questions formulated by this Court, and more particularly, questions (a) & (b) as set out hereinabove, the Court dealt with the question of remedies of person other than the judgment-debtor. However, when the person is claiming under a judgment-debtor his rights to obstruct warrant for possession, are definitely limited. Such person cannot set up a better right or a higher

right than the one which was claimed by the judgment-debtor. Respondent No.5 Kantilal, son of deceased Benkorben was simply impleaded as heir and legal representative of deceased Benkorben, and was, therefore, not entitled in law to claim any better or higher right than the right claimed by deceased Benkorben. Deceased Benkorben only claimed 1/3rd share in the property which was granted to her by final decree. Even independent right which was claimed by respondent No.5 Kantilal of being tenant of suit premises, inconsistent with the claim of his mother deceased Benkorben who was claiming to be the co-sharer of the suit property, was enquired into and adjudicated upon by the executing Court and was found without substance. In the First Appeal preferred in the High Court also said contention was negatived and the respondent No.5 Kantilal undertook to hand over the possession of the suit property by 31st March, 1993. Despite this legal position of right of a person claiming as heir and legal representative of judgment-debtor, the claim of respondent No.5 Kantilal was fully adjudicated upon. It is worthwhile to note that in such proceedings the present appellant-Gangaben, daughter of deceased Benkorben was all throughout a party, but she never claimed any independent right in the suit property over a period of ten years. She did not claim that she was in possession of the suit property. Her case that she was entitled to 1/9th share out of 1/3rd share allottable to her deceased mother-Benkorben is never denied by anyone, and an attempt made by her to thwart the execution proceedings by filing independent suit proved to be abortive as the trial Court rightly vacated the ad-interim relief and ordered the executing Court to proceed further with the execution of decree. The present appellant-Gangaben being the daughter of deceased Benkorben is undoubtedly claiming under deceased Benkorben as her daughter. She, therefore, cannot set up any better or higher right than that of the deceased Benkorben has set up. In this fact situation, in fact, she was not entitled to claim a full-fledged enquiry under Order 21, Rule 97 as regards her claim of maintenance or residence towards the suit property. Said claim was even not put forward by her mother-deceased Benkorben."

"Para.10 Assuming that the right of maintenance or residence claimed by present appellant was also required to be gone into, in my opinion the executing Court cannot turn Nelson's eye to the fact situation obtaining before it. Firstly, the executing Court must be alive to the fact that in India woes of litigants actually begin after obtaining decree from the competent Court. Secondly, it should not be lost sight of that she was simply claiming as heir and legal representative of judgment-debtor in the partition suit. The judgment-debtor has not claimed any right above her 1/3rd share in the suit property. As heir and legal representative, therefore, she could not have claimed any better or higher right than the judgment-debtor. Thirdly, the right of tenancy which was put forward by her brother-Kantilal was fully investigated into and finally rejected by the High Court and in such proceedings also the present appellant-Gangaben was party. Her silence at that time or her failure to put forward her claim of right of maintenance or residence in the suit property must also be given proper weight. No reason is forthcoming from her as to why she kept mum when her brother-Kantilal was claiming tenancy in the suit property and as to why she did not dispute the claim of her brother that he alone was in possession of the suit property. It was, therefore, a deliberate, dubious and diabolical device adopted by her to anyhow cling/stick to suit premises and not to permit the auction-purchasers to reap the fruits of decree. Fifthly, it is also to be kept in mind that sale price was deposited by the auction-purchasers as back as 1983. They have by confirmation of sale in their favour and after depositing the full amount become entitled to recover the possession and they have lawfully acquired the right of getting possession of suit property and it is being denied by collusion and collaboration between brother Kantilal and sister Gangaben who have one after another resorted to separate proceedings so as to obstruct the execution of possession warrant. In such proceedings when a prayer for injunction is made by filing obstruction application by sister after then years, and when she has chosen not to put forward any claim whatsoever in the suit premises, both under the doctrine of waiver or abandonment or by principle analogous to Order 2,

Rule 2 C.P.Code she cannot be permitted to raise the claim of her right, title or interest in the suit property. Undoubtedly, she has come to the Court with unclean hands and was not entitled to any equitable relief in execution proceedings. The trial Court was, therefore, right in not granting any injunction in her favour in the suit. In my opinion, the very principles would apply even when she filed application for obstruction. The very equitable principles are rightly applied by the executing Court and by impugned order the executing Court refused injunction prayed for and has permitted the execution of Kirkul application No.55 of 1983. The executing Court has rightly not foreclosed any right of the parties to lead evidence in respect of the claim put forward by the present appellant. Since she was not the person in possession of the property and since she never put forward her claim at any point of time during last 10 years and since she never objected to the claim of her brother that he alone was in possession of the suit property, she was not entitled to any equitable relief and the learned 2nd Jt.Civil Judge(S.D.) Surat was fully justified in rejecting the Misc.Application No.154 of 1993 by refusing to grant injunction as prayed for."

"Para.11 While parting with this judgment this Court cannot resist observing the fact that the provisions of Order 21 Rule 97 to Rule 103 C.P.Code should not be permitted to be misused especially when the party putting forward right, title and interest in the property is not claiming any independent right, title or interest but is simply claiming right as heir and legal representative of deceased judgment-debtor. When the deceased judgment-debtor had not claimed any higher or better right than what is awarded to him/her, the heir and legal representative stepping into the shoes of original judgment-debtor cannot claim any better or higher right and they may be confined to rights available to them only as heir and legal representative of deceased judgment-debtor."

8.2 He has also relied upon the Full Bench judgment of Madhya Pradesh High Court consisting of G.P.Singh, C.J., J.S.Verma and M.L.Malik, JJ. in the case of Smt.Usha Jain and others vs. Manmohan Bajaj and others

reported in AIR 1980 Madhya Pradesh 146 particularly para 5 & 11 the Hon'ble Court has observed as under:

"Para.5 It was, therefore, the settled view of this Court that a third party resisting the execution had no locus standi to claim investigation by the executing Court into his alleged right or title prior to his dispossession as Order 21, Civil P.C. did not contemplate any such enquiry at his instance either under Rules 35 and 36 or Rules 95 and 96 of Order 21, Civil P.C. the remedy of such third party under Order 21 was only after dispossession, under Order 21, Rule 100, Civil P.C., Order 21, Rule 97 being merely an enabling provision for the benefit of the decree-holder/auction-purchaser, it necessarily followed from this view that the decree-holder/auction-purchaser could not be compelled indirectly to apply under Order 21, Rule 97 if that could not be done directly. Any construction of the provisions which had the result of indirectly compelling the decree-holder/auction purchaser to apply under Order 21, Rule 97 was, therefore, contrary to the settled view of this Court including the view taken by the Division Bench in Ballabdas's case (supra). This was the position when Bhagwat Narayan's case came to be decided."

8.3 He has also relied upon the judgment in the case of Harijan Wood Workers Production-cum-Sales Co-operative Society Ltd. vs. Smt. Maya Wati and another reported in AIR 1985 Punjab and Haryana 181 particularly para 4 the Hon'ble Court has observed as under:

"para.4 From a bare reading of the aforesaid Rules, it is clear that if a decree-holder is resisted or obstructed by any person in obtaining possession of the property, he can make an application under R.97 complaining of the resistance or obstruction. The person causing resistance or obstruction is not entitled under that rule to make an application. However, if the decree-holder makes the necessary application, the person causing the resistance or obstruction is entitled to defend his conduct. In other words at that stage he is entitled to be in defensive but cannot take an offensive step. In case he wants to take such a step he can do so under R.99 but after surrendering possession. The Rule has been framed to protect the

decree-holder from frivolous claims by third persons. All questions arising between the parties to the proceedings, on an application under R.97 or R.99 and relevant to the adjudication of the application are now required to be determined by the Court dealing with the application. However, if the person in possession wants to raise any dispute before surrendering possession, he can do so by filing a suit for declaration of his title to the property. During the pendency of the suit, he can protect his possession by making an application for temporary injunction. The Court will dispose of the application on merits and grant relief to temporary injunction if the plaintiff is able to establish prima facie strong case in his favour. Therefore, we are of the opinion that any person other than the judgment-debtor cannot file an objection petition under R.97 on the ground that he is not liable to ejectment in execution of a decree obtained by the decree-holder against the judgment-debtor."

8.4 He has also relied upon the another judgment in the case of Ganesh Narayan Kulkarni vs. Ganesh Ramchandra Joshi and others reported in AIR 1971 Bombay 16 particularly para 4 on page 18 which reads as under:

"In order to appreciate the contention of Mr.Kotwal, it is necessary to refer to the provisions of O.21 Rules 97, 99 and 103 of the Civil P.C. Rule 97 provides that where the holder of a decree for possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction and the Court shall investigate into the matter. This right is conferred, either on the decree-holder himself or on an auction purchaser. It is not conferred on a purchaser by a private treaty."

8.5 Learned advocate for the respondent has submitted that in this case whole controversy is whether decree dated 31.12.82 passed in Civil Suit No.60/76 is nullity or not. He submitted that Regular Civil Suit No.60/76 was contested, evidence was led by both the parties and ultimately the trial court has given a detailed reasons and passed the judgment in favour of the plaintiff in

this behalf. Thereafter appeal was filed and appeal was withdrawn. He further submitted that Civil Suit No.694/83 was filed by Rameshchandra for the same relief regarding declaration i.e. nullity. He further submitted that ultimately the suit has been withdrawn though suit was filed in 1983 and suit was withdrawn in 1991 after protected hearing in this behalf. Thereafter present appellant filed Civil Suit No.179/86 for the same relief which was also withdrawn on 17.1.97. He submitted that in view of the same when the Regular Darkhast No.123/84 which was filed on 12.11.84 where various proceedings were undertaken and both the trial court as well as appellate court entire evidence was led and ultimately rejected and, therefore, this Court may not entertain the second appeal in this behalf. This is a clear abuse of process of law by the appellants and their only aim is to see that the possession may not be handed over to the present plaintiff - landlord in this behalf. He further submitted that in any view of the matter the findings of earlier court in Civil Suit No.694/93, Civil Suit No.179/86 as they were certain findings of court and ultimately matter carries to this Court and, therefore, plea of res judicata can also be raised by original plaintiff landlord - respondent herein and this Court may not consider the plea which were already adjudicated earlier in this behalf and the decree which is nullity such contention raise which was withdrawn and, therefore, it would not be open for the appellants to raise such contention before the appellate court.

8.6 Mr.Kharadi, learned advocate for the respondent has also try to support the reasonings of the trial judge on the ground that principle of res judicata is applied in this case. He submitted that in all other proceedings also identical issue namely the decree obtained by the plaintiff in Civil Suit No.60/76 is to be declared nullity, the said issue has also been raised in the subsequent suit and, therefore, in the execution proceedings, when the appellant original plaintiff tried to raise the same, the same is barred by principle of res judicata. He submitted that once the matter is finally decided by a competent court, no party can be permitted to re-open it in a subsequent litigation. He submitted that doctrine of res judicata is based on the following three maxims:

- (1) no man should be vexed twice for the same cause.
- (2) it is in the interest of the State that there should be an end to a litigation; and

(3) a judicial decision must be accepted as correct.

8.7 He submitted that in the interest of a public at large that a final judicial decision pronounced by a judicial tribunal having competent jurisdiction over the cause or matter in litigation and over the parties thereto, the doctrine of res judicata amounts to this, that a cause of action once finally determined without appeal between the parties on the merits by a competent tribunal cannot afterwards be litigated by new proceedings either before the same or any other tribunal.

8.8 Learned counsel for the respondent has relied upon the judgment of this Court in the case of Gujarat Housing Board vs. Kalpeshkumar Naranbhai Patel and Ors. reported in 2002(2) GLH 113. He has stated that in this case whether the decree obtained by present respondent in Civil Suit No.60/76 is nullity or not. In that case the Rameshchandra has also filed Civil Suit No.694/83 and his heirs namely present appellants had also filed Civil Suit No.179/86 where there was complete adjudication of their grievances. In view of the same, once the suit filed by Rameshchandra and his sons are dismissed, second challenge namely filing obstruction application in execution application by the heirs of Rameshchandra for the same relief, the same is barred by principle of res judicata.

9. On the other hand, Mr.S.M.Shah, learned advocate for the appellants submitted that in this case original decree was passed against Shivilal Keshavji whereas present proceedings have been initiated by Rameshchandra and his heirs and, therefore, principle of res judicata does not apply.

My Conclusion:-

10. I have considered the facts of the case particularly Civil Suit No.60/76, Civil Suit No.694/83, Civil Suit no.179/86 and also Regular Darkhast No.123/84 from which present proceedings have been initiated. I have also considered the rival submissions of Mr.S.M.Shah as well as Mr.Kharadi. I have also considered Order 21 Rule 35, Rule 97 to 103 in this behalf. I have also considered the various decisions of the Hon'ble Supreme Court cited by both the counsel in this behalf. In view of the effect of amendment of Rule 97 to 103 is as under:

"Changes in the law - Rules 97 to 101 and R.103

deal with the subject of resistance to delivery of possession to a holder of a decree for possession of immovable property and to the auction-purchaser at the sale held in execution of the decree. These rules have, therefore, to be read together as forming one scheme. The scheme under rules 97 and onwards, before the enactment of the Amendment Act, 1976 was as follows - R.97 enabled the holder of a decree for possession of immovable property and the purchaser at the Court-sale of such property to apply to the executing Court, if they were resisted or obstructed in obtaining possession of such property by any person, complaining of such resistance or obstruction. The inquiry by the executing Court was a summary inquiry concerned only with the question of present possession and the procedure laid down under the rules was not intended for decisions to be made by hearing oral evidence tendered on behalf of the parties (r). If the resistance was by the judgment-debtor or some other person at his instigation the Court had to direct that the applicant be put in possession (r.98). But if the resistance was occasioned by a person other than the judgment-debtor claiming in good faith to be in possession of the property on his own account or on account of a person other than the judgment-debtor the Court would have to dismiss the application (r.99). Rule 100, as it then was, enabled a person (other than the judgment-debtor) if dispossessed either by the decree-holder or the purchaser, to apply to the Court complaining of such dispossession and r.101 provided that if the court found that such an applicant was in possession on his own account or on account of some person other than the judgment-debtor, it could direct that the applicant be put in possession. There was no provision for an appeal against an order passed, under r.98 or r.99 or r.101. Such an order was conclusive as between the parties except that a party, other than the judgment-debtor, against whom the order was passed could under r.103 institute a suit to establish his right to the possession claimed by him; but subject to the result of such a suit the order was conclusive. The order was conclusive if the person against whom it was passed failed to file such a suit or if the suit filed by him was dismissed."

"The Amendment Act, 1976 has retained sub-r.(1) of r.97 but has substituted a new sub.r.(2) in place of the earlier sub.r.(2). Rules 98 to 106 are new. Those amendments are in conformity with the legislative policy of entrusting the determination of all questions including question as to the title of the concerned property by the executing Court. The general scheme of the new rules 97 to 103 has been altered on the lines of the amendments made in rules 58 and 59. The main feature of the amendments made by the 1976 Act is that all questions (including the question as to right, title or interest in the property) arising between the parties to the proceeding under r.97 or r.99 must be determined by the executing Court and not left to be decided by way of a separate suit. To ensure this the earlier rule 103 has been omitted and a new rule 103 has been enacted providing that the order passed under these rules shall have the same force and shall be subject to the same conditions as to an appeal as if it were a decree. Consistent with these changes in the nature of the inquiry and the order passed therein sub.r(2) of r.97 has been amended by substituting the words "to adjudicate" for the words "for investigating"."

[Re. Commentary of Mulla of Code of Civil Procedure Volume II 5th Edition page 1942, 1943 and 1944].

10.(A) In view of the aforesaid amendment, the general scheme of Rules 97 to 103 has been altered on the lines of the amendments made in Rules 58 and 59. The main feature of these amendments is that questions (including a question relating to right, title or interest in the property) arising between the parties to a proceeding under Rule 97 or Rule 99 are to be determined in execution proceeding itself and not left to be decided by way of separate suit. Rule 98 has been amplified to cover cases of resistance, etc., by a person including a transferee pendente lite, acting under any instigation by the judgment-debtor in putting the property in the possession of the applicant after all questions referred to in Rule 101 have been determined. The trial court has considered the amendment of right, title and interest of obstructionists in this behalf.

10.(B) I have considered the provisions of Order 21 Rule 35, Order 21 Rules 97 to 103 and also the judgments of the Hon'ble Apex Court cited by the learned counsel for the appellant particularly case of Babulal, Brahmdeo

Chaudhary, B.Gangadhar's case. I have also considered the judgment of this Court in the case of Bhairavnath & Cultural Society and other judgments cited by the learned counsel for the appellants. I have also considered unreported judgments also cited by the learned counsel for the appellant. I have also considered the judgments cited by Mr.Kharadi, learned counsel for the respondents particularly the judgment of the Hon'ble Apex Court (Three Judges Bench) in the case of Silverline Forum Pvt.Ltd. case and also judgment of this Court in Gangaben Ishwarlal's case. From the facts which I have set out, in my view judgment in this case execution petition has been filed with a view to obtain possession in connection with the decree passed by Civil Court in Civil Suit No.60/76. In that case though Shivilal was party but Rameshchandra was also a family member of Shivilal and decree was passed against Shivilal. It may be noted that Rameshbhai himself has filed a suit being Civil Suit No.694/83 for the similar relief and that matter was contested right upto this Court for which I have made necessary reference earlier in my judgment. It may be noted that the present appellants have also filed Civil Suit No.179/86 and that suit has also been withdrawn by them. In fact, regular darkhast from which present proceedings arose as various proceedings which have taken place in which necessary inquiry has been carried out by the trial court in this behalf. In fact the obstructionists has given applications Exhs.82, 84, 87 and 94 out of which the learned Judge has heard Exhs.84, 87 and 94 and all possible questions which were relevant for consideration were determined between the parties whatever contention raised by the obstructor was considered by both the trial court as well as appellate court in realm of execution proceedings under Order 21 Rule 97 onwards. Here the appellants are the heirs of Rameshchandra and therefore they cannot get better title then what Rameshchandra had in this behalf. The full-fledged inquiry under Order 21 Rule 97 to Rule 103 has been held by the trial court and the appellate court. All possible contentions have been considered. In fact even if I dismiss the second appeal, the trial court will have to consider Exh.82 and in that case the trial court will consider also the contentions of obstructor in light of the judgment delivered by me in this behalf. In view of the same all the contentions raised by the appellants are liable to be dismissed and judgment of trial court as well as appellate court is confirmed. In fact the trial court and the appellate court has given very cogent and convincing reasons for dismissing the applications Exh.84, 87 and 94. However, I have also given reasons for dismissing the same in this behalf.

10.(C) The duty of executing court was to give effect to the terms of decree that was already passed and beyond which the court could not go. The executing court has also power to consider the application filed by the obstructionists which has been filed in this case and the executing court has also given finding on the said application.

10.(D) Inspite of the aforesaid litigation which I have indicated, the decree holder was prevented from realising the fruits of the decree in this behalf in spite of the fact that the matter was decided not by the trial court but by this Court also in this behalf. The trial court will make an effort to effectuate the decree which has been passed in favour of respondent.

11. I have gone through the judgment of the trial court as well as of the appellate court and also application Exh.82, 84 and 93 which has been filed by the objector and the reply filed by the original plaintiff has been considered by both the trial court and the appellate court and the inquiry as contemplated under Order 21 Rule 96, 97 has been gone by the trial court as well as appellate court and both the trial court and appellate court has finally complied with the provisions of Rule 96 and 97 of the CPC and, therefore, I see no substance in the second appeal raised by the appellant in this behalf. The appellants have completely abuse the process of law by filing suit after suit and only one issue raised in several proceedings and in all proceedings their rights are determined and crystalised. It has been decided that they have no right, title or interest in the suit property. However they have filed several proceeding and obtained protection one way or other. They had filed proceeding only with a view to see that the decree holder may not obtain the possession of the property in question.

11.(A) It may be noted that in this case I am dealing with second appeal filed under Section 100 of the CPC. The scope of second appeal is extremely limited unless there is a substantial question of law arises and if there is an error of law by the appellate court this Court has a jurisdiction to entertain the second appeal. However, in view of the limited jurisdiction, I am not inclined to interfere with the present second appeal. The jurisdiction of second appeal has been stated by the Hon'ble Supreme Court in Kondiba Dagadu Kadam vs. Savitribai Sopan Gujar and another reported in (1999) 3 SCC 722 particularly para 5 which reads as under:

"Para.5 It is not within the domain of the High Court to investigate the grounds on which the findings were arrived at, by the last court of fact, being the first appellate court. It is true that the lower appellate court should not ordinarily reject witnesses accepted by the trial court in respect of credibility but even where it has rejected the witnesses accepted by the trial court, the same is no ground for interference in second appeal when it is found that the appellate court has given satisfactory reasons for doing so. In a case where from a given set of circumstances two inferences are possible, one drawn by the lower appellate court is binding on the High Court in second appeal. Adopting any other approach is not permissible. The High Court cannot substitute its opinion for the opinion of the first appellate court unless it is found that the conclusions drawn by the lower appellate court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the Apex Court, or was based upon inadmissible evidence or arrived at without evidence."

11.(B) Another judgment of the Hon'ble Supreme Court in the case of Veerayee Ammal vs. Seenii Ammal reported in AIR 2001 SC 2920 where also in para 10 on page 2922 the Hon'ble Supreme Court has observed as under:

"The question of law formulated as substantial question of law in the instant case cannot, in any way, be termed to be a question of law much less a substantial question of law. The question formulated in fact is a question of fact. Merely because of appreciation of evidence another view is also possible would not clothe the High Court to assume the jurisdiction by terming the question as substantial question of law. In this case Issue No.1, as framed by the trial court, was, admittedly, an issue of fact which was concurrently held in favour of the appellant-plaintiff and did not justify the High Court to disturb the same by substituting its own finding for the findings of the Courts below, arrived at on appreciation of evidence."

11.(C) In view of this judgment of Kondiba Dagadu Kadam (supra) and Veerayee Ammal (supra) when the Hon'ble

Supreme Court has circumscribed the jurisdiction of the second appeal extremely limited it is not possible for me to interfere with the present second appeal where both the trial court as well as appellate court have considered all question of fact in this behalf. The question raised by the learned advocate for the appellants are the question of fact. The only question of law which was regarding interpretation of Order 21 Rules 97 to 103 for which I have considered the judgment of the Hon'ble Supreme Court and our High Court and in view of this settled provisions, the learned trial court as well as appellate court has not committed any error of law and therefore this second appeal do not raise any substantial question of law and therefore I do not intend to interfere with the present second appeal.

12. In view of the aforesaid discussions, I confirmed the judgment and decree dated 30th October, 1991, passed by the learned Extra Assistant Judge, Jamnagar, in Regular Civil Appeal No.70/91 and also the judgment and decree dated 23rd September, 1991, passed by the 2nd Jt.Civil Judge (S.D.), Jamnagar, in Regular Darkhast No.123/84 order passed below Exhs.84, 87 & 94. In view of the same, the second appeal is dismissed. The applications Exh.84, 87 and 94 filed by objectors Rameshchandra Manji as well as wife and children of applicants are rejected. The objector Rameshchandra Manji and the applicants should pay the costs of Rs.1000/- to the decree holder as the cost of this appeal. It is further ordered that the execution be proceeded from the stage at which these applications were filed in this behalf.

12.1 In view of the aforesaid judgment of this Court dated 20th August, 2002, I request the learned trial Judge at Jamnagar to entertain and decide the application Exh.82 filed by obstructionists in Regular Darkhast No.123/84, as expeditiously as possible, as this being very old matter where we are considering Civil Suit No.60/76. I request the learned trial Judge to adjudicate the same within three months from the date of the receipt of the writ of this Court and after deciding the same, inform the registry of this Court about the same.

13. Before I conclude this judgment, I quote the following quotations quoted in the Book of "The Law is a Ass" by Ronald Irving page 26:

"Justice delayed is not only justice denied - it
is also justice circumvented, justice mocked and

the system of justice undermined.
[Richard M.Nixon (1913-94), New York Times, 12
March 1971]."

In view of the same, the second appeal is
dismissed with costs.

(K.M. Mehta, J.)

syed/